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Ms. Suzan B. Friedman, Esq.
Tariff Division
Common Carrier Bureau
Federal Communications Commission
Room 518
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

Re: Virtual Collocation Tariff Proceeding
CC Docket No. 94-97

TWComm Freedom of Information Act Request
Control No. 95-211

Dear Ms. Friedman:

This letter is written in response to your recent solicitation of comments from Time Warner Communications Holdings, Inc. ("TWComm") and other interested parties concerning the terms and conditions under which certain cost data submitted by Southwestern Bell Telephone Company ("SWBT"), in conjunction with its virtual collocation tariff offerings, is to be made available to parties participating in the Commission's virtual collocation tariff review proceeding.

At the outset, TWComm wishes to emphasize that its willingness to participate in the ongoing discussion of the terms of the SWBT protective order should not in any sense be construed as a concession by TWComm that the use of a protective order or any other form of restriction on its access to SWBT's cost support data is either necessary or appropriate. TWComm's submission of comments addressing SWBT's proposed protective order is intended solely to expedite disclosure of the requested information to TWComm. Accordingly, TWComm's participation in these discussions should not be viewed as offering any support whatsoever for the proposition that limited disclosure pursuant to a protective order or otherwise is warranted in this or in any other proceeding, with respect to TWComm or any other party.

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On this basis, TWComm offers the following comments with respect to the terms of the proposed protective order which SWBT submitted to the Commission on July 13, 1995:

1. Applicability to TWComm: As drafted, Paragraph 1 of SWBT's proposed protective order references only the FOIA requests which the Common Carrier Bureau conditionally granted in its November 1, 1994 letter ruling. To the extent that any amendment of the protective order entered by the Commission pursuant to this ruling affects the terms and conditions of access afforded to TWComm, pursuant to the Bureau's June 16, 1995 letter ruling on TWComm's FOIA request (Control No. 95-211), TWComm urges that Paragraph 1 be revised to reflect the latter ruling as well.

2. Definition of "Confidential Information": TWComm recommends that the Commission add the following language at the end of Section 3 in the proposed protective order:

"Confidential Information" shall not include information contained in the public files of the Federal Communications Commission that is subject to disclosure under the Communications Act of 1934 or any Commission regulations. Nor shall it include information that, at the time it is provided through discovery in these proceedings or prior thereto, is or was public knowledge, or which becomes public knowledge other than through disclosure in violation of this Order. Nor shall it include information found by the Commission or a court of competent jurisdiction not to merit the protection afforded "Confidential Information" protection under the terms of this Order.

TWComm believes the addition of this language supplies needed clarification and provides for a more balanced definition that better protects the interests of all parties.

3. Bifurcated Treatment of Confidential Information: TWComm opposes the bifurcation of the definition of confidential information into "Confidential Information" and "Highly Sensitive Confidential Information," as reflected in Section 3 and in other sections of the proposed protective order. The protective order's procedures for protecting "Confidential Information" provide more than adequate protection for any purported interests of SWBT. SWBT has made no showing that an additional heightened level of protection, which SWBT apparently would have unbounded discretion to trigger, is reasonable or necessary.

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On the other hand, the classification of information as "Highly Sensitive Confidential Information," coupled with the onerous restrictions applicable to such information, would provide SWBT with significant opportunities to misuse the protective order to impede efforts by TWComm and others to examine SWBT's cost data and to comment on the lawfulness of its proposed rates. In this regard, TWComm specifically opposes the inclusion of Section 10 ("Procedures - Highly Sensitive Confidential Information") in the SWBT protective order. The proposed procedures -- (1) limiting availability of such materials to the producing party's Washington, D.C. location, (2) only allowing access to "Highly Confidential Information" by the taking of notes, and (3) restricting the explicit replication of "Highly Sensitive Confidential Information" or the taking of notes "which contain information from which Highly Sensitive Confidential Information could be derived" -- are unduly burdensome, unnecessary to protect SWBT's legitimate interests, and would allow SWBT to impede the investigation by TWComm and other interested parties into whether SWBT's rates are just and reasonable.

In addition, the proposed requirement that notes containing "explicit replication" of "Highly Sensitive Confidential Information" (or from which such information could be derived) shall not be allowed out of the room in which such information is stored cannot be enforced unless SWBT personnel review such notes. To the extent that SWBT proposes to review notes taken by counsel of opposing parties, such action would appear to violate the attorney work product privilege. Imposition of such a condition clearly would result in an invasion of the "zone of privacy" which this privilege is designed to protect, which would undermine the ability of counsel to prepare its case "free from unnecessary intrusion by the opposing parties and their counsel."¹

4. Restriction of Access to Confidential Information to Five Persons: TWComm objects to the restriction in Section 6 that allows only up to five persons to have access to "Confidential Information." Such a limitation is completely arbitrary. SWBT has made no showing that such a limitation is necessary to protect any legitimate interest, and indeed, no such showing is possible. Accordingly, the limit on the number of persons permitted access to "Confidential Information" should be deleted from Section 6.

¹ Hickman v. Taylor, 329 U.S. 495, 510-511 (1947).

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5. Two Hundred Page Limit: Section 9 of the proposed protective order should be revised by deleting the final paragraph of this section and adding the following sentence at the end of the second paragraph:

If the ordered material is voluminous, the requesting party may review the voluminous material at SWBT's Washington, D.C. office and designate material to be produced. Should the designated material exceed 200 pages, the producing party may impose a copying charge which shall not exceed the cost of duplicating said excess material.

Should you have any questions regarding the above-described comments or related matters, please feel free to contact me at 202/429-4724.

Respectfully submitted,



John L. McGrew

cc: William Caton, Acting Secretary (original and 2 copies)
Kathryn Conley, Records Management Division
Donald Shephard (TWComm)